85-212

NO.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

NO.

RUDY JAMES MARTIN,

Petitioner/Applicant

VS.

TWO-R DRILLING COMPANY, INC.
and
EMPLOYERS INSURANCE COMPANY OF WAUSAU,

Defendants/Respondents

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

NATHAN GREENBERG
Greenberg & Dallam
848 Second Street
P. O. Box 365
Gretna, Louisiana 70054
(504) 366-6491
ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are as follows:

(a) Whether the defense of assumption of the risk may be utilized as being tantamount to contributory negligence; and

(b) Whether an objection to a jury instruction as given is sufficient where the jury instruction is revised and no later objection is made to the revision.

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PETITION FOR WRIT OF CERTIORARI

The instant application for a writ of certiorari or review is filed herein by Rudy James Martin, petitioner, following the decision by the Honorable U. S.

Court of Appeals, Fifth Circuit, rendered per curiam on May 21, 1985, affirming without decision the prior judgment of the Honorable U. S. District Court for the Eastern District of Louisiana, Division "G".

An application for re-hearing en banc was filed timely and on June 18, 1985 was denied.

LOWER COURT OPINIONS

The case was tried by a jury which rendered a verdict in favor of the petitioner in the sum of $103,610.00 and reduced the award by a finding of contributory negligence of 90%. Application for new trial was filed to the District Court and judgment by the Trial Judge denying our request for a new trial is annexed hereto as Exhibit "A". Copy of the decree of the Fifth Circuit is annexed hereto as Exhibit "B" and the denial of re-

hearing en banc is designated as Exhibit "C".

JURISDICTION

Jurisdiction of this Honorable Court is invoked under Title 28 U.S. Code, Section 1254 and Section 1651, seeking to review the judgment of the Honorable United States Court of Appeals, Fifth Circuit, handed down on May 21, 1985. An application for re-hearing en banc was timely filed, and on June 18, 1985, said application for re-hearing en banc was denied. This application for a writ of certiorari or review is timely under the provisions of 28 U.S. Code, Section 2101(c).

PRINCIPLES AND STATUTES INVOLVED

The principles involved herein are those enunciated by 54 U.S. Code, Section 54 and Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424, 59 S.Ct. 262, 83 L.Ed. 265

(1938), and decisions which follow it.

STATEMENT OF THE CASE

The facts of the instant case disclose that Rudy Martin was working for Two-R Drilling Co., as a rig welder; that he, together with Leroy Richou, another rig welder, undertook to erect a scaffold consisting of approximately six (6) boards at a height of twenty (20) to twenty-two (22) feet above the deck of the drilling barge. The scaffold was erected at a distance of eighteen inches (18") at the low end to three (3') or four feet (4') below some flooring that the drain lines ran below. In order to work on the drain lines, the rig welders either had to stoop, bend, squat, or lie down doing their work on the scaffold boards. While in this abnormal work position, Mr. Martin moved

from one board to another; and in changing his position in the work area the scaffold board he was on moved from beneath him causing him to twist his back and seriously injure himself. Plaintiff suffered a ruptured intervertebral disc at the L4 - L-5 level and has had poor results from surgery.

The basic defense pleaded here is contributory negligence; however, we believe that what has occurred here is that the defense of assumption of the risk has been sufficiently enmeshed with the contributory negligence defense so as to masquerade the defense of assumption of the risk as contributory negligence.

The matter was submitted to a jury who found the defendant's vessel to be unseaworthy and who found the plaintiff to be ninety (90%) per cent contribu-

torily negligent. We respectfully submit that the basic unfairness of the instructions with reference to the doctrine of contributory negligence versus assumption of the risk was sufficient to warrant the award of a new trial herein.

ARGUMENT

I

We believe that the inadequacy of the instruction given in the finding of contributory negligence of ninety (90%) per cent by the jury herein, and that the insufficiency of the instruction becomes manifest when considered in the light of the subsequent finding of the jury.

At the jury charge conference, when plaintiff's counsel called the court's attention to the fact that nothing was contained in the instructions about assumption of the risk not being a defense,

the court originally declined to state anything in the instructions; however, the next morning when plaintiff's counsel submitted a brief to show that the instructions must contain something about assumption of the risk not being a defense, the court then changed its mind and stated that it would give the following instruction:

> "Comparative fault determines the extent, if any of the seaman's negligence. The defense of assumption of the risk is not available in these circumstances. While the seaman does assume the risk of those perils of the sea which are inescapable, no risk that can be reasonably controlled by the ship owner is assumed by the seaman."

Included within the purview of the instructions were the court's instructions relative to contributory negligence, which were as follows:

> "If a preponderance of the evidence does not support the plaintiff's Jones Act claim for

negligence, then your verdict should be for the defendant. If, however, a preponderance of the evidence does support the plaintiff's claim, you will then consider the defense raised by the defendant.

"The defendant contends that the plaintiff was himself negligent and that such negligence was a legal cause of his injuries. This is an affirmative defense and the burden of proving that defense, by a preponderance of the evidence, is upon the defendant, who must establish:

"First, that the plaintiff was also 'negligent'; and

"Second, that the plaintiff's negligence was a 'legal cause' of his own damage.

"If you find in favor of the defendant on this defense, that will not prevent recovery by the plaintiff; it will only reduce the amount of plaintiff's recovery. In other words, if you find that the accident was due partly to the fault of the plaintiff, that his own negligence was, for example, the per cent responsible for his own damage, then you shall fill in that percentage as your finding on the special verdict form I will explain to you in a moment. That finding

> will not prevent the plaintiff from recovering but will merely reduce the plaintiff's total award by the percentage of his negligence that you find. Of course, by using the number ten percent as an example, I do not mean to suggest any specific amount. You may find that the plaintiff was as little as one percent or as much as ninety-nine percent negligence."

We do not deny that when the Court indicated that it would give an instruction about assumption of the risk not being a defense and that we indicated an agreement thereto; however, inasmuch as plaintiff's case is premised entirely upon assumption of the risk, and the defense herein is based solely on contributory negligence, we submit that it should have been necessary to explain the difference between the two defenses. Such explanation did not occur, and that is where we believe the plain error or manifest miscarriage of justice occurred.

II

Once the Appellate Court panel learned that the trial judge reconsidered the jury instructions on assumption of the risk and that we did not object to the limited instruction on assumption of the risk which appears above, the Appellate Court panel literally "turned us off" notwithstanding the fact that we did object when the Trial Judge said he would give no instruction on assumption of the risk. After we submitted a brief thereon the following morning, the Trial Judge did give the limited instruction on assumption of the risk without any explanation as to the difference between assumption of the risk and contributory negligence, and that lack of explanation of the difference between the two defenses is where we believe the error

occurred. How is the jury to know that assumption of the risk is an impermissible defense that is being masqueraded under the nomer of contributory negligence without an explanation of the difference between the two defenses? When the Appellate Court panel literally "turned us off", we believe that it failed to consider the actions of the Trial Court with relation to the "plain error" review or "manifest miscarriage of justice" under Rule 51 of the Federal Rules of Civil Procedure.

We do not stand here before the Court and say that we objected at every stage of the proceedings to the failure of the trial court to give a proper assumption of the risk instruction. However, the trial judge certainly knew what our position was based upon the

brief which we submitted after the trial judge originally indicated he would give no instruction on assumption of the risk. We feel that what occurred here was that the defense was utilizing contributory negligence as a substitute for assumption of the risk, and that under circumstances such as these, it becomes necessary to explain the difference between assumption of the risk and contributory negligence. That was not done, and that is what we believe constituted the reversible error herein!!!

A number of statements appear in the jurisprudence and by the text writers to indicate that contributory negligence is being used increasingly as a substitute for the assumption of the risk defense which is now statutorily eliminated. See Gilmore & Black, The Law of Admiralty, (2nd Ed. §6-27a, p. 355). We

respectfully submit that once such a situation becomes apparent, the trial court then must undertake to explain the difference between assumption of the risk which is not a defense and contributory negligence which is a defense. In Rivero v. Farrell Lines, Inc., 474 F.2d 255 (2nd Cir. 1973), the Court defined the difference as follows:

> "The distinction between assumption of the risk and contributory negligence is well established. In common law days the knowledgeable acceptance by an employee of a dangerous condition when and if such acceptance was necessary for the performance of his duties was assumption of the risk. 2 F. Harper & F. James, The Law of Torts, §21.4 (1956). Contributory negligence on the other hand, connotes some careless act or omission on the part of the employee over and above that knowledgeable acceptance. Mumma v. Reading Co., 247 F.Supp. 252, 256-257 (E.D. Pa. 1965). As the defense of assumption of the risk has been abolished by statute -- indeed, 'every vestige' of the doctrine 'obliterated,'

Tiller v. Atlantic Coast Line Railroad Co., 318 U.S. 54, 58, 63 S.Ct. 444, 87 L.Ed. 610 (1943) -- the first issue before us is whether the charge permitted assumption of the risk to go to the jury in the guise of contributory negligence."

That Court further stated:

"The only theory of contributory negligence the record reveals that was both argued by appellee's counsel in summation and charged to the jury by the court was the argument that appellant was careless in moving in and about the pantry, knowing the sloppy condition of the floors. This theory, however, was really assumption of risk masquerading under another name, because it allowed a finding of contributory negligence on the strength of appellant's knowledge that a dangerous condition in his line of duty existed and his working in that line of duty. * * *"

As can readily be seen, the verdict in the Rivero v. Farrell Lines, Inc., case was apparently premised upon the same theory of assumption of the risk that the verdict herein was premised upon. Thus, the danger of assumption of

the risk being masqueraded as contributory negligence did exist in the instant case as well as the Rivero case, and for this reason the verdict herein should also be reversed.

We hasten to refer the Court to the recent decision of City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 101 S.Ct. 2748, 68 L.Ed.2d 616 (1981), wherein the U. S. Supreme Court concluded that the interest of justice required careful consideration of their "novel question" of federal law.

The Supreme Court further stated in the City of Newport case that "plain error" review under Rule 51 is suited to correcting obvious instances of injustice or misapplied law. We respectfully submit that the situation presented herein, vis-a-vis contributory negligence as opposed to assumption of the risk should

warrant this Honorable Court correcting the injustice or misapplied law herein.

It is clear that plaintiff's case is premised on the theory of negligence and unseaworthiness, and that the defense of assumption of the risk is what the defendant is really relying upon -- not contributory negligence!! When such a situation occurs within a factual context warranting such a conclusion, we believe that the instruction to the jury should explain the difference between assumption of the risk and contributory negligence. We do not believe that the instruction as given does that.

Not every case of alleged contributory negligence will substitute for the defense of assumption of the risk; nor will every claim of assumption of the risk substitute for the claim of contributory negligence. However, we

respectfully submit that in those cases where the defense tendered is one of contributory negligence, and the plaintiff's response appears to be that the defense tendered is really assumption of the risk disguised as contributory negligence, then and only then would an explanation of the two defenses be required.

We respectfully submit that the basic inadequacy or insufficiency of the instruction becomes apparent when examined in the light of these circumstances. Thus, we respectfully submit that the instructions as given by the Trial Judge warrant the conclusion that plain error and a miscarriage of justice or misapplied law occurred in this case, and that the cause should be remanded for a new trial.

We respectfully submit that the

doctrine of assumption of the risk which has been eliminated by statute from FELA cases and by the jurisprudence in Jones Act cases is at controversy herein. 45 U.S.C. §54, provides:

> "In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

That statute is expressly made applicable to Jones Act cases. Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424, 59 S.Ct. 262, 83 L.Ed. 265 (1938).

This Honorable Court has held that assumption of the risk is not defense

under the Jones Act. See Socony-Vacuum Oil Co. v. Smith, Supra. In the recent decision of Bobb v. Modern Products, Inc., 648 F.2d 1051 (5th Cir. 1981), the appellate court dealt with a strikingly similar situation to that presented by the instant case and stated:

> "* * * If indeed the actions taken by the plaintiff were examples of 'bad seamanship,' then the jury might be warranted in finding that the plaintiff had not fulfilled his slight duty of care. However, we provide a word of caution to the trial court in allowing the argument that plaintiff was contributorily negligent in placing himself in a position of danger. This argument is too closely akin to an impermissible assumption of the risk argument, and apparently was rejected by the Court in Williams II, supra, 549 F.2d at 978, as not contributing to the injury."

Likewise, in Ceja v. Mike Hooks, Inc., 690 F.2d 1191 (5th Cir. 1982), the Court dealt with the problem and stated:

> "In contrast to the broad duty imposed upon a vessel owner to supply a safe work place, the sea-

man's duty to protect himself is slight. Bobb v. Modern Products, Inc., 648 F.2d 1051, 1056-57 (5th Cir. 1981). Although the seaman has a duty to use reasonable care, this duty is tempered by the realities of maritime employment 'which have been deemed . . . to place large responsibility for his safety on the owner.' Mahnich v. Southern S.S. Co.321 U.S. 96, 103, 64 S.Ct. 455, 459, 88 L.Ed. 561 (1944). In Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424, 431, 59 S.Ct. 262, 266, 83 L.Ed. 265 (1939), the Supreme Court said 'seamen are the wards of admiralty, whose traditional policy it has been to avoid, within reasonable limits, the application of rules of the common law which would affect them harshly because of the special circumstances attending their calling. See also Cox v. Esso Shipping Co., 247 F.2d 629, 635-36 (5th Cir. 1957). Accordingly, assumption of risk is not a defense to any claim for injuries which might befall a seaman engaged in his hazardous employ. See Mahnich v. Southern S.S. Co., supra; Socony-Vacuum Oil Co. v. Smith, supra; Bobb v. Modern Products, Inc., supra. Contributory negligence is available to mitigate a vessel owner's liability according to comparative fault, when an injured seaman has been negligent in breaching a duty to act or refrain from acting. See Comeaux v.

T. L. James & Co. 666 F.2d 294, 299 (5th Cir. 1982); Bobb v. Modern Products, Inc., supra; Allen v. Coast Products, Inc., supra, 623 F.2d at 362.

"In the immediate case, the trial court based its finding of appellant's contributory negligence upon two factors: 1) his failure to seek or obtain a line of adequate length; and 2) his failure to move away from the dangerous position he maintained near the tow bit, in view of prior and immediate warnings. We hold that the trial court's reliance upon the former factor in this case reflects an impermissible expansion of the limited duties placed upon seamen in the safe performance of their duties."

The Ceja v. Mike Hooks, Inc., case quoted extensively from Socony-Vacuum Oil Co. v. Smith, and stated:

"The Supreme Court in Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424, 59 S.Ct. 262, 83 L.Ed. 265 (1939), enunciated and explained the application of assumption of risk and contributory negligence in seamen's cases.

'The seamen, while on his vessel, is subject to the rigorous discipline of the sea and has little opportunity to appeal to the protection from abuse of

power which the law makes readily available to the landsman. His complaints to superior officers of unsafe working conditions not infrequently provoke harsh treatment. He cannot leave the vessel while at sea. Abandonment of it in port before his discharge, to avoid unnecessary dangers of employment, exposes him to the risk of loss of pay and to the penalties for desertion. In the performance of duty he is often under the necessity of making quick decisions with little opportunity or capacity to appraise the relative safety of alternative courses of action . . . .

'Any rule of assumption of risk in admiralty, whatever its scope, must be applied in conjunction with the established admiralty doctrine of comparative negligence and in harmony with it. Under that doctrine contributory negligence, however gross, is not a bar to recovery but only mitigates damages. There being no defense of assumption of risk where the seaman is without opportunity to use a safe appliance, it seems plain that his choice of a defective instead of a safe one, resulting in injury, does not differ in either the quality of the act

or in its injurious consequence, in any practical way, from his correspondingly negligent use of a safe or an unsafe appliance, where its use has contributed to an injury resulting from a breach of duty by the owner . . . . In either case the seaman's negligence is a contributing cause of his injury, without which the ship owner would be liable to the full extent of the damage.

'The incongruity and practical embarrassments in the application of a rule that the negligence in the one case bars recovery, while that in the other only reduces the recoverable damages, are evident. The common law is consistent in holding that both contributory negligence and assumption of risk are defenses. But other considerations apart, it seems inconsistent, and an impracticable refinement, to apply the rule for which petitioner contends in a system of law which maintains the comparative negligence rule to the fullest extent . . . .

'We think that the consistent development of the maritime law in conformity to its traditional policy of affording adequate protection to seamen through an exaction of a high degree of responsibility of owners for the seaworthiness of vessel and the safety of their

> appliances will be best served by applying the rule of comparative negligence, rather than that of assumption of the risk, to the seaman who makes use of a defective appliance knowing that a safe one is available.'"

In Shipman v. Central Gulf Lines, Inc., 709 F.2d 393 (5th Cir. 1983) a plaintiff was held to be 75% contributorily negligent. In discussing the applicability of contributory negligence as opposed to assumption of the risk, the Court stated:

> "In order to support a jury finding of contributory negligence, the seaman must have had a duty to act or refrain from acting. Bobb v. Modern Products, Inc., 648 F.2d 1051, 1056-57 (5th Cir. 1981). While a seaman's duty to protect himself is slight, the duty does exist. Id.; Robinson v. Zapata Corp., 664 F.2d 45, 48 (5th Cir. 1981). A seaman would not be contributorily negligent merely because he used an unsafe tool or appliance or proceeded in an unsafe area of the ship. Ceja, 690 F.2d at 1194-95. Where it is shown, however, that there existed a safe alternative

available to him, of which he knew or should have known, a seman's choice of an unsafe course of action can properly be considered in determining whether he was negligent. Id. at 1195, citing Robinson v. Zapata Corp., 664 F.2d 45, 49 (5th Cir. 1981) (where seaman knew of 'several simple ways' -- well-known and readily available to him -- to avoid the unsafe course created by a lack of proper equipment, he had the duty to follow the safe course of conduct) and Hussein v. Isthmian Lines, Inc., 405 F.2d 946, 949-50 (5th Cir. 1968) (where seaman has tools close at hand which could safely perform a task, the seaman has a duty to use them). There was testimony indicating that Shipman knew that he was within the danger zone when his injury occurred, and that he could have inspected the crane by using other methods that were safe, well-known, and readily available to him. Relevant evidence on this issue included Shipman's prior experience on similar lash vessels and loading operations; Shipman's own testimony that he knew about safe methods of contacting the crane operator, such as having the stevedores use walkie-talkies or using a telephone located on the leg of the crane; his awareness of normal safety precautions, in-

> cluding his statement that everyone involved in the cargo operations knew to stay out of the way of the crane; his statement that he knew bells were inoperative when he came on duty, but that he knew that '[y]ou stay out of the way of the crane, whether (sic) the sirens or bells work or not.'"

We believe that we have here a clear cut case of assumption of the risk where the defendant was masquerading that defense as contributory negligence. We believe that the instruction as given to the jury warranted an additional instruction to distinguish between assumption of the risk and contributory negligence.

Your Honors know very well that instructions are read to a jury by a Judge covering a relatively short span of time. In this particular case, the instructions relative to assumption of the risk covered approximately six (6)

lines and used the term "assumption of the risk" twice. We believe that this case warranted more of an instruction relative to distinction between the two defenses. The failure to give the distinction between those two defenses in the instructions is what we are here complaining of and that is why we believe we should have a new trial.

III

More and more we find that in this day and age of comparative negligence, defendants are utilizing assumption of the risk through the medium of contributory negligence. Certainly not every case of contributory negligence warrants the conclusion that it is a case of assumption of the risk, nor does every case of assumption of the risk warrant the conclusion that it is a case of con-

tributory negligence. However, in those cases where it becomes apparent that assumption of the risk is being utilized as tantamount to contributory negligence, then we believe it becomes necessary for the trial judge to simply explain the difference between the two. How difficult would that be? One more paragraph should have been added to the instructions that would spell out the difference !!!

That is where we believe the trial court erred, and that is why we believe a writ and a remand should be granted to rectify the error.

REASONS FOR GRANTING THE WRIT

45 U.S.C. §54 eliminates the doctrine of assumption of the risk in FELA cases which has been held to also apply to Jones Act cases. We are well aware of the fact that Socony-Vacuum Oil Co. v. Smith, Supra, indicates that

assumption of the risk may be used as a basis of utilizing contributory negligence as a defense. We believe that is error. To the extent that the jurisprudence has developed utilizing assumption of the risk as a basis of expanding contributory negligence as a defense, we believe that such concept is erroneous. Either assumption of the risk should not be a defense or if it's going to be permitted as a substitute for contributory negligence, this Honorable Court should speak out on the point. We do not believe that assumption of the risk should be permitted to masquerade as contributory negligence any longer.

Originally, objection was made to the failure of the Court to give any instruction with reference to assumption of the risk. Thereafter the Court did give a very limited instruction to which

we have referred in this argument. We respectfully submit that when the facts of any given case indicate that assumption of the risk is being masqueraded as contributory negligence, then we believe the Court must explain the difference between the two, spelling out that assumption of the risk is not a defense and that only contributory negligence is a defense. That was not done herein, and that is one of the principal reasons why we have applied for a writ herein. We do not believe that the masquerade should be permitted any longer.

CONCLUSION

We believe that it is about time for courts to follow the congressional mandate of 45 U.S.C., Section 54, and to eliminate the defense of assumption of the risk. Where assumption of the risk

is argued as a defense under the guise of contributory negligence, the trial court should fully explain the difference between the two defenses so as to permit the jury to understand that assumption of the risk cannot be masqueraded under the guise of contributory negligence. The issue is squarely presented for determination herein.

WHEREFORE, petitioner prays that this Honorable Court issue a writ of certiorari directed to the Honorable Judges of the United States Court of Appeals, Fifth Circuit, commanding them to send to this Court the necessary certified copies of the proceedings entitled "Rudy James Martin v. Two-R Drilling Co., et al", Docket No. 84-386 on the Docket of said Court and lately pending therein, to the end that their validity may be ascertained and that

after due proceedings, a writ of certiorari issue herein, that the matter be reviewed, and that the judgment herein granting plaintiff a money judgment in the sum of $103,610.00, subject to a finding of 90% contributory negligence be reversed, and that a new trial be granted.

Petitioner further prays for all necessary writs and orders and decrees in the premises and for all general and equitable relief.

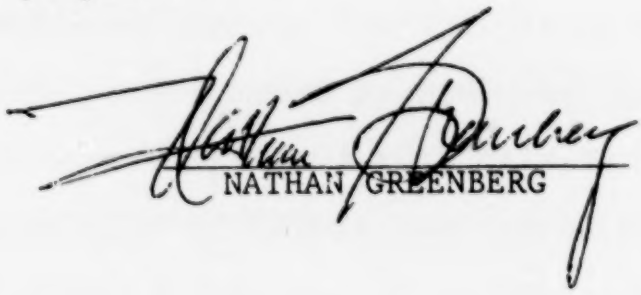
Respectfully Submitted,

GREENBERG & DALLAM
848 Second Street
P. O. Box 365
Gretna, Louisiana 70054
(504) 366-6491

BY: _____
NATHAN GREENBERG
ATTORNEY FOR RUDY J.
MARTIN, PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing petition for writ of certiorari or review has been mailed to Charles Hanemann and Scott Stains of Henderson, Hanemann & Morris, 300 Lafayette Street, Houma, Louisiana 70360 and to James L. Donovan, 2701 Metairie Road, Metairie, Louisiana 70001, Attorneys for Defendants, by postage prepaid.



NATHAN GREENBERG

EXHIBIT "A"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

RUDY JAMES MARTIN	*	CIVIL ACTION
VERSUS	*	NO. 83-2072
TWO"R"DRILLING COMPANY, INC., ET AL	*	SECTION "G"

This civil action came on for trial by jury on May 7, 1984. The jury found defendant's vessel to be unseaworthy and returned a verdict in favor of plaintiff and against defendant on an unseaworthiness claim. The jury awarded plaintiff $103,610.00 in damages; however, it found that plaintiff's own negligence contributed 90 percent to his injuries.

Plaintiff now brings a motion for judgment n.o.v. and/or for new trial. He bases his motion on the following grounds: (i) because the jury instructions fail to explain the distinction between contributory negligence and

assumption of the risk, the jury was confused as to the application of the two doctrines, resulting in a finding of 90 percent negligence on the part of plaintiff; (ii) with respect to the issue of plaintiff's loss of earnings, the Court erroneously permitted defendant to show the decline in the annual earnings of other rig welders employed by defendant after plaintiff's injury; and (iii) the jury's award of $15,000.00 for physical pain and suffering and mental anguish and anxiety is so low as to "shock the conscience."

Defendant also brings a motion, to alter or amend judgment. Defendant asserts that it is entitled to a credit in the amount of $10,500.00 for sums paid by defendant to plaintiff for maintenance between the date of the accident and the date of trial.

PLAINTIFF'S MOTION FOR JUDGMENT N.O.V. AND/OR FOR NEW TRIAL

A motion for judgment n.o.v. may not be granted unless a motion for a directed verdict is made at the close of all the evidence by the party seeking the motion. Freimanis v. Sea-Land Service, Inc., 654 F.2d 1155, 1160-61 (5th Cir. 1981); Quinn v. Southwest Wood Products, Inc., 597 F.2d 1018, 1024-25 (5th Cir. 1979). With respect to this rule, the Fifth Circuit has noted:

> The reasons behind the rule are sound. For example, a litigant may not gamble on a jury's verdict and then later question the sufficiency of the evidence on appeal . . . . Similarly, the litigant who has not moved for a directed verdict in the trial court must have been of the view that the evidence made a case for the jury; he should not be permitted on appeal to impute error to the trial judge for sharing that view.

Little v. Bankers Life & Casualty Co., 426 F.2d 509, 511 (5th Cir. 1970). A fair reading of the record in this case fails to show any indication that plaintiff moved for a directed verdict at any time prior to the jury's deliberations. See Record, Doc. Nos. 32-34. Accordingly, plaintiff's motion for judgment n.o.v. is DENIED.

A motion for directed verdict is not, however, a prerequisite to a motion for new trial. Coughlin v. Capitol Cement Co., 571 F.2d 290, 297 (5th Cir. 1978); Urti v. Transport Commercial Corp., 479 F.2d 766, 769 (5th Cir. 1973). A trial court may, in the exercise of its sound discretion, set aside a verdict and grant a new trial if, in its opinion, the verdict is against the great weight of the evidence or will result in a miscarriage of justice, even though there

may be substantial evidence which would prevent the direction of a verdict. United States v. Bucon Constr. Co., 430 F.2d 420, 423 (5th Cir. 1970).

Plaintiff's assignments of error in this case are without merit. The jury's verdict was in accordance with the great weight of the evidence and there was no miscarriage of justice.

Plaintiff's first assignment of error offered in support of his motion for new trial is that the jury instructions fail to clarify the distinction between contributory negligence and assumption of risk, resulting in significant jury confusion.

Rule 51 of the Federal Rules of Civil Procedure provides, in pertinent part:

> No party may assign as error the giving or the failure to give an instruction unless he objects

> thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.

Fed. R. Civ. P. 51. Moreover, it has been held that when, after an objection has been made to a charge, the trial judge corrects the charge in accordance with and to the satisfaction of the objecting party, the objecting party, in order to preserve his right to object to the corrected charge, must renew his objection and specifically call the attention of the trial judge to any remaining error. See Palmer v. Hoffman, 318 U.S. 109, 119 (1943); New York Life Ins. Co. v. Schlatter, 203 F.2d 184, 188 (5th Cir. 1953); Hardware Mutual Casualty Co. v. Jones, 363 F.2d 627, 631 (4th Cir. 1966); Clancy v. Brunswick-Balke-Collender Co., 291 F.2d 799, 806 (5th Cir. 1961).

Pursuant to Fed. R. Civ. P. 51, a

jury instruction conference was held on May 9, 1984, the day before closing argument, and objections to the proposed charge were entertained. At that conference, plaintiff's counsel requested an instruction to the effect that the defense of assumption of risk was not available in a Jones Act case. Because defendant had not raised the defense and thus it was not before the jury, I initially declined to charge the jury as plaintiff requested.

The following day another jury instruction conference was held. Plaintiff's counsel vigorously persisted in his request for a charge on the absence of an assumption of the risk defense in a Jones Act case. Plaintiff cited to the court authority, including DeLima v. Trinidad Corp., 302 F.2d 585, 587 (2d Cir. 1962), holding that, even though assump-

tion of the risk was not presented as a defense, an instruction that the defense was not available in the case "would have been proper to avoid confusion in the jury's mind." I determined that some form of instruction was appropriate and, accordingly, the following language from Reyes v. Vantage S.S. Co., 558 F.2d 238, 244 (5th Cir. 1977), was included in the instruction:

> Comparative fault determines the extent, if any, of the seaman's negligence. The defense of assumption of risk is not available in these circumstances. While the seaman does assume the risk of those perils of the sea which are inescapable, no risk that can be reasonably controlled by the ship owner is assumed by the seaman.

See Record Doc. No. 34, at 14. Plaintiff's attorney indicated that he was satisfied with instructio-n and raised no further objection.

In light of the foregoing, it is clear that plaintiff failed to object to

the corrected charge and thus failed to preserve his right to later object to the charge. Accordingly, plaintiff's first assignment of error is without merit.

Plaintiff's second assignment of error is that the Court erroneously permitted defendant to show the decline in the annual earnings of other rig welders employed by defendant after plaintiff's injury. This is a Jones Act claim involving, inter alia, a claim by plaintiff for loss of future earnings. In order to prove his claim, plaintiff put on evidence in the form of his income tax returns, payroll records, and his own testimony. Defendant then put on evidence that other rig welders employed by defendant suffered substantial reductions in their annual earnings over the course of the two years following the accident.

It is obvious that evidence of a

decrease in earnings of comparably employed rig welders is probative of the issue of lost future earnings and is thus admissible. See Fed. R. Evid. 401, 402. The three cases cited by plaintiff, decided on the basis of Louisiana substantive law, are inapposite. Moreover, the substantive law with respect to a Jones Act seaman's loss of earnings, found in Jones & Laughlin Steel Corp. v. Pfeifer, 103 S.Ct. 2541 (1983), and Culver v. Slater, 722 F.2d 114 (5th Cir. 1983), contains no prohibition of evidence of the earnings of employees comparably situated to plaintiff. Accordingly, plaintiff's second assignment of error is also without merit.

Plaintiff's third assignment of error is that the jury's award of $15,000.00 for physical pain and suffering and mental anguish and anxiety is so

low as to shock the conscience. A district court may, within its discretion, overturn a jury verdict for inadequacy of damages. The court will interfere concerning the amount of damages, however, only in extreme and exceptional cases where the award is "so gross . . . as to be contrary to right reason." Bailey v. Southern Pacific Transp. Co., 613 F.2d 1385, 1390 (5th Cir.), cert. denied, 449 U.S. 836 (1980); see Thezan v. Maritime Overseas Corp., 708 F.2d 175, 182-83 (5th Cir. 1983).

The jury's $15,000.00 damage award for plaintiff's pain and suffering and mental anguish and anxiety is neither grossly inadequate nor against the great weight of the evidence. There was substantial evidence in this case that plaintiff suffered previous back injuries. There was also evidence which

cast doubt upon the veracity of plaintiff's complaints. Moreover, the jury was entitled to disbelieve the testimony of medical experts as it saw fit. Accordingly, the jury's assessment of damages is supported by the evidence in this case and will not be disturbed.

In light of the foregoing, plaintiff's motion for judgment n.o.v. and/or for new trial is DENIED.

DEFENDANT'S MOTION TO ALTER OR AMEND JUDGMENT

Defendant has filed a motion to alter or amend judgment, requesting that the judgment in this matter be amended to give defendant a credit in the amount of $10,500.00 for the maintenance it paid plaintiff between the date of the accident, November 29, 1982, and the date of trial, May 7, 1984.

The general rule with respect to a

credit for duplicative damages under maritime law has been stated as follows:

> It is obvious on principle that a plaintiff who has recovered medical expenses, a living allowance and unearned wages under the name of maintenance and cure has no right to recover them a second time in a damage action. Thus any maintenance and cure expenses which have been recovered as damages ought to be subtracted from a maintenance and cure award and vice versa.

G. Gilmore & C. Black, The Law of Admiralty, Chapter VI, §6-9, at 293; accord Vickers v. Tumey, 290 F.2d 426, 435 (5th Cir. 1961).

Recently, however, the Fifth Circuit clarified the rule by stating the following:

> In Cates v. United States, 451 F.2d 411, 417-18 n. 20 (5th Cir. 1971), we held that unless there is an "affirmative showing on the record" that the elements compensated for (here lost wages) have actually been included in the maintenance award, a seaman is not precluded from recovering maintenance. Moreover, the burden is on the one

> claiming duplication to show that the damages assessed against it have "in fact and in actuality" been previously covered. (citations omitted). No such showing was made. Furthermore, we find no interrogatory, objection to the charge, or argument to the jury that suggests duplication. Absent this, we hold that the award for maintenance and cure is not duplicated by the award for lost wages.

Wood v. Diamond M Drilling Co., 691 F.2d 1165, 1171 (5th Cir. 1982); accord Billiot v. Sewart Seacraft, 382 F.2d 662, 664-65 (5th Cir. 1967).

Defendant has failed to sustain its burden of affirmatively showing that the damages assessed against it "in fact and in actuality" have been previously covered by maintenance payments. Moreover, defendant made no request for a special interrogatory in the verdict form to resolve this issue, made no objection to the charge, and made no argument to the jury that suggested duplication. The mere

fact that defendant pleaded a credit and put on proof of such falls far short of the burden made clear in Wood v. Diamond M Drilling Co., supra. Accordingly, defendant's motion to amend judgment requesting a credit in the amount of $10,500 is **DENIED**.

New Orleans, Louisiana, this 6th day of July, 1984.

/s/ MOREY L. SEAR
MOREY L. SEAR
UNITED STATES DISTRICT JUDGE

EXHIBIT "B"

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 84-3486

RUDY J. MARTIN,

Plaintiff-Appellant,

VS.

TWO R. DRILLING COMPANY, INC.
and
EMPLOYERS INSURANCE COMPANY OF WAUSAU,

Defendants-Appellees.

- - - - - - - -

Appeal from the United States District Court
for the Eastern District of Louisiana

- - - - - - - -

(May 21, 1985)

Before JOHNSON, JOLLY, and HILL,
Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 47.6.

EXHIBIT "C"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 84-3486

RUDY JAMES MARTIN,
Plaintiff-Appellant,

versus

TWO R DRILLING COMPANY, INC., ET AL.,

Defendants-Appellees.

- - - - - - -

Appeal from the United States District Court
for the Eastern District of Louisiana

- - - - - - -

ON SUGGESTION FOR REHEARING EN BANC

(Opinion May 21, 5 Cir., 1985,
_____F.2d ____)

(JUNE 18, 1985)

Before JOHNSON, JOLLY and HILL, Circuit Judges.

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the

that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ SAM JOHNSON
United States Circuit Judge

Supreme Court, U.S.
FILED
AUG 30 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-212

In The
Supreme Court of the United States
October Term, 1985

RUDY JAMES MARTIN,

Petitioner,

v.

TWO "R" DRILLING COMPANY, INC.,
and
EMPLOYERS INSURANCE COMPANY OF WAUSAU,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PHILIP E. HENDERSON
CHARLES HANEMANN
OF
HENDERSON, HANEMANN & MORRIS
A Professional Law Corporation
300 Lafayette Street
Houma, Louisiana 70360
Telephone: (504) 868-2081

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

BEST AVAILABLE COPY

QUESTIONS PRESENTED

The record does not in fact present for review the questions stated at page i of the petition for a writ of certiorari. If the record properly presents any question, it is only:

May a party, notwithstanding Rule 51 of the Federal Rules of Civil Procedure, object on appeal to an instruction to the jury to which he did not timely object in the district court?

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No. 85-212

In The
Supreme Court of the United States
October Term, 1985

RUDY JAMES MARTIN,

Petitioner,

v.

TWO "R" DRILLING COMPANY, INC.,
and
EMPLOYERS INSURANCE COMPANY OF WAUSAU,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS AND JUDGMENTS BELOW

The appendices to the petition for a writ of certiorari set out the district court's minute entry on the plaintiff's motion for post-trial relief (Exhibit "A"), the Fifth Circuit's per curiam opinion (Exhibit "B"), and the Fifth Circuit's denial of rehearing (Exhibit "C"). Those opinions are not reproduced again in this brief.

The district court's judgment on the jury verdict is not reproduced in the appendices to the petition, but is included as Appendix A to this brief.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The Federal Employers' Liability Act, 45 U.S.C.A. § 54, provides:

> In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

The Jones Act, 46 U.S.C.A. § 688, provides:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply....

Rule 51 of the Federal Rules of Civil Procedure provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs,

any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT OF THE CASE

The plaintiff was a seaman and member of the crew of a vessel. While in the employ of defendant Two "R" Drilling Company, Inc., the plaintiff sustained injury. The plaintiff filed this suit for damages against Two "R" and its insurer, Employers Insurance Company of Wausau, under the Jones Act, 46 U.S.C.A. § 688, and the general maritime law. The defendants raised the plaintiff's comparative negligence in mitigation of his recovery. The case proceeded to trial by jury.

The plaintiff submitted no proposed jury instruction in writing on assumption of the risk.

At the first charge conference, the plaintiff, not the defendants, raised assumption of the risk and insisted orally upon an instruction to the jury concerning it. (Transcript p. 308) The defendants said nothing, neither advocating nor opposing the instruction on assumption of the risk upon which the plaintiff insisted. (Tr. pp. 308-309)

The court initially declined to instruct the jury on assumption of the risk because it was not an issue in the case. (Tr. p. 308)

At a second charge conference, however, the plaintiff persisted in his demand for an instruction to the jury on assumption of the risk. (Tr. p. 320) The court relented (Tr. p. 320) and decided to instruct the jury on assumption of the risk. (Tr. pp. 406-407) The court read aloud the charge which the court ultimately gave to the jury (Tr. pp. 320-321) and asked the plaintiff's attorney whether the charge satisfied him. The plaintiff's attorney responded: "Yes, sir, I think it does." (Tr. p. 321) The plaintiff did not object to the instruction on assumption of the risk before the jury retired to consider its verdict.

The relevant portions of the transcript are reproduced as Appendix B to this brief.

The jury found that the employer was not negligent, that the vessel was unseaworthy, and that the plaintiff was comparatively negligent. The trial court entered judgment against the defendants on the jury's verdict, reducing the recovery by the percentage of comparative negligence found.

The plaintiff filed a motion for post-trial relief in the district court, raising for the first time his objection to the instruction on assumption of the risk. The trial court denied that motion.

The plaintiff appealed to the Fifth Circuit, which affirmed.

———o———

ARGUMENT

None of the considerations enumerated in this Court's Rule 17 favoring issuance of the writ is present.

The decisions below conflict with no decision of another federal circuit or of a state court of last resort.

The challenged instruction represents no departure from the accepted and usual course of judicial proceedings. To the contrary, the instruction comes verbatim from the Fifth Circuit's decision in *Reyes v. Vantage S.S. Co.*, 558 F.2d 238, 244 (5th Cir. 1977).

This court settled long ago the substantive question, determining that assumption of the risk, under any guise, neither defeats nor mitigates recovery under the Federal Employers' Liability Act or under the Jones Act. *Owens v. Union P.R.R.*, 319 U.S. 715, 63 S.Ct. 1271, 87 L.Ed. 1683 (1943); *Tiller v. Atlantic C.L.R.R.*, 318 U.S. 54, 63 S.Ct. 444, 87 L.Ed. 610 (1943); *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 59 S.Ct. 262, 83 L.Ed. 265 (1939). The challenged instruction is consistent with those decisions.

Nor is it a departure from the accepted and usual course of judicial proceedings to disregard an objection to an instruction not made until long after the jury has retired to consider its verdict. To the contrary, the courts below followed the unequivocal dictates of Rule 51 of the Federal Rules of Civil Procedure. Rule 51 is clear. A long and unbroken line of jurisprudence in the lower courts enforces Rule 51 as written. *E.g., Bestway Equip. Serv. v. Berwind Lines*, 655 F.2d 440 (1st Cir. 1981); *Griggs v. Firestone Tire & Rubber Co.*, 513 F.2d 851 (8th Cir. 1975); *Honea v. West Virginia Pulp & Paper Co.*, 380 F.2d 704

(4th Cir. 1967); *Bern v. Evans,* 349 F.2d 282 (8th Cir. 1965); *Western Fire Ins. Co. v. Word,* 131 F.2d 541 (5th Cir. 1943).

Rule 51 is not without its exceptions. Even absent timely objection, a federal appellate court may notice errors which would "seriously affect the fairness, integrity or public reputation of judicial proceedings." *Johnson v. United States,* 318 U.S. 189, 200, 63 S.Ct. 549, 87 L.Ed. 704, 713 (1943). There is no showing that adherence in this case to the clear dictates of Rule 51 will have any such effect. Moreover, where the failure to object timely is the result not of mere "inadvertence or oversight", but is rather "accompanied by an express waiver" of an objection, the appellate courts will not consider an untimely objection. *Ibid.* Here, when the district court pointedly asked him whether the proposed instruction on assumption of the risk satisfied him, the plaintiff's attorney responded, "Yes, sir, I think it does." (Tr. pp. 320-321) So this is not a case in which to ignore Rule 51.

The appellate courts may also notice "plain error", even absent timely objection under Rule 51. *City of Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 256, 101 S.Ct. 2748, 2754, 69 L.Ed.2d 616 (1981). But review of "plain error" is for "correcting obvious instances of injustice or misapplied law." *Ibid.* Here, the challenged instruction is correct and consistent with the decisions of this Court. This case is not an "obvious instance of injustice or misapplied law."

For this Court to write out Rule 51, or to carve out of Rule 51 an exception excusing this plaintiff's tardy objection, would play havoc with federal trial and appellate

procedure. Trial counsel could cagily lie in ambush, waiting and even hoping for the trial court to instruct the jury erroneously. Trial counsel could refrain from timely objecting to the erroneous instruction, and await the jury's verdict. If the verdict were to turn out favorably, trial counsel would be satisfied. But if the verdict were to turn out adversely, trial counsel could then object for the first time to the instruction, forcing a new trial and/or an appeal. The system would be flooded unnecessarily with motions for post-trial relief, appeals and new trials. Rule 51 offers a far more workable procedure, requiring objection before the jury deliberates, thus affording the trial judge an opportunity to correct erroneous instructions and to avoid unnecessary new trials and appeals.

Assumption of the risk means that a plaintiff is at fault in exposing himself knowingly and voluntarily to the risk in the first place. That was never the defendants' position. Nothing in the defendants' opening statement, closing argument, or anywhere else suggests that the defendants argued assumption of the risk. The record contains substantial evidence that in rigging the scaffolding the plaintiff was less careful than a reasonably prudent rig welder would have been. That is pure comparative negligence. The jury apparently agreed.

The plaintiff implies that only by confusing assumption of the risk and comparative negligence could the jury have returned a verdict that the plaintiff was comparatively negligent to the extent of ninety per cent. A seaman's duty to protect himself from harm is admittedly "slight". *Spinks v. Chevron Oil Co.*, 507 F.2d 216, 223 (5th Cir. 1975). But given the proper facts, a finding of ninety per cent.

comparative negligence is proper. *Thezan v. Maritime Overseas Corp.*, 708 F.2d 175, 180-181 (5th Cir. 1984). See also *Colomb v. Texaco, Inc.*, 736 F.2d 218 (5th Cir. 1984).

And this is a case in which the jury's finding of ninety per cent. comparative negligence is supported by substantial evidence. As a rig welder, by his own admission, the plaintiff himself was responsible for rigging up the scaffolding he needed to do his job safely. The plaintiff knew how to rig up the scaffolding. He knew that scaffolding was needed for the job. He knew how many boards to put up and how to put the boards up. He knew how to secure the boards, if necessary. He knew how to get help. Nothing he needed was denied him. (Tr. pp. 45-57) The testimony of several other witnesses corroborates the plaintiff's. (See generally the testimony of Dufrene, Tr. pp. 183 et seq., Reeves, Tr. pp. 202 et seq., Richoux, Tr. pp. 60-68, 235-259, and Stanley, Tr. pp. 260 et seq.) Every flaw of which the plaintiff complained was his duty to remedy. The jury reasonably inferred that the plaintiff did not conduct himself, in rigging the scaffolds and in working on them, as a reasonably prudent rig welder would have, and assessed comparative negligence at ninety per cent.

Assessment of a percentage of comparative negligence is a question of fact, peculiarly within the province of the jury. This court should not grant certiorari to review a finding of fact.

———o———

CONCLUSION

This court should deny the petition for a writ of certiorari.

Respectfully submitted,

/s/ PHILIP E. HENDERSON
CHARLES HANEMANN
OF
HENDERSON, HANEMANN & MORRIS
A Professional Law Corporation
300 Lafayette Street
Houma, Louisiana 70360
Telephone: (504) 868-2081

Attorneys for Respondents

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION

NO. 83-2072

SECTION "G"

RUDY JAMES MARTIN

vs.

TWO R DRILLING CO., INC., ET AL.

JUDGMENT

Considering the verdict of the Jury;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, Rudy James Martin, and against defendants, Two R. Drilling Company, Inc. and Employers Insurance Company of Wausau in the amount of $10,361.00 plus interest and costs from date of judgment.

Dated at New Orleans, Louisiana, this 14th day of May, 1984.

/s/ Loretta G. Whyte
CLERK

APPROVED AS TO FORM:

/s/ Morey L. Sear
UNITED STATES DISTRICT JUDGE

APPENDIX B

THE COURT: All right. Mr. Greenberg, you did not submit any objections to the charge, but I understand that you have one.

MR. GREENBERG: Yes, sir.

THE COURT: You may make it now.

MR. GREENBERG: Yes, sir. My objection to the charge is that it contains no reference to the fact that the law abrogates a defense of the assumption of risk, and I felt that a jury charge to that effect should have been appropriate. Secondly—

THE COURT: Let's dispose of that.

MR. GREENBERG: All right.

THE COURT: Since assumption of risk is not pled as a defense, there is no charge at all on the law of assumption of risk. It isn't part of the law that the jury is given to consider. Therefore, they could not consider a defense of assumption of risk.

Transcript p. 308.

THE COURT: . . . This is a case in which, if there is liability, the liability is so tremendously diminished by the comparative negligence of the plaintiff that perhaps it is a proper case in which to at least have the jury aware of its distinction. This is a case, for example, that suggests to me easily a jury's finding, and I have had them before, of liability on the part of the defendant, and a hundred percent contributory negligence on the part of the plaintiff, strange as it might appear. The case that I refer to

is *Reyes versus Vantage Steamship Company,* 558 F.2d 238.

Let me tell you what I intend to do. When we talk about Jones Act defenses, at the bottom of page 14 of the charge, see if you find, "in the favor of the defendant will not prevent his recovery," and so forth. This is what I am going to do. Comparative fault determines the extent, if any, of the seaman's negligence. While the seaman does not assume those risks of the perils of the sea which are inescapable, no risk that can be reasonably controlled by the shipowner is assumed by the seaman, and that should satisfy yours. Does it?

MR. GREENBERG: Yes, sir, I think it does.

Tr. pp. 320-321.

THE COURT: [Instructing the jury.] . . . The defendant contends that the plaintiff was himself negligent and that such negligence was a legal cause of his injuries. This is an affirmative defense and the burden of proving that defense, by a preponderance of the evidence, is upon the defendant, who must establish:

First, that the plaintiff was also "negligent"; and

Second, that the plaintiff's negligence was a "legal cause" of his own damage.

If you find in favor of the defendant on this defense, that will not prevent recovery by the plaintiff; it will only reduce the amount of plaintiff's recovery. In other words, if you find that the accident was due partly to the fault of the plaintiff, that his own negligence was, for example, ten percent responsible for his his own damage, then you shall fill in that percentage as your finding on the special

verdict form I will explain to you in a moment. That finding will not prevent the plaintiff from recovery but will merely reduce the plaintiff's total award by the percentage of his negligence that you find. Of course, by using the number ten percent as an example, I do not mean to suggest any specific amount. You may find that the plaintiff was as little as one percent or as much as ninety-nine percent negligent.

Comparative fault determins [sic] the extent, if any, of the seaman's negligence. The defense of assumption of risk is not available in these circumstances. While the seaman does assume the risk of those perils of the sea which are inescapable, no risk that can be reasonably controlled by the ship owner is assumed by the seamen [sic]

. . . .

Tr. pp. 406-407.